U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 September 2003

CASE NO.: 2002-LHC-2555

OWCP NO.: 07-163115

IN THE MATTER OF

NEAL DENNIES,
Claimant

v.

TRANSPORT TERMINAL,
d/b/a P & O PORTS LOUISIANA, INC.,
Employer

APPEARANCES:

William S. Vincent, Jr. Esq.,
On behalf of Claimant

William C. Cruze, Esq.,
On behalf of Employer

Before: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Neal Dennies (Claimant) against Transport Terminal d/b/a/P & O Ports Louisiana, Inc.(Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on June 5, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified and introduced 13 exhibits which were admitted including Department of Labor documents from the current and a prior claim Claimant filed against Employer (Case No. 2001-LHC-2229; OWCP No. 07-158071); Claimant's payroll records from Waterfront Employers of New Orleans for 52 weeks prior to his date of injuries on September 26, 2000 and January 18, 2002, as well as Claimant's payroll records since January 18, 2002 to present, along with Claimant's W-2s for 1998 and 1999; a January 8, 2003 letter from ILA 1497 James McCleland together with a deposition of McCleland dated May 22, 2003; emergency room records from Medical Center of Louisiana for other longshore employees in 2001; medical records and bills of Dr. Charles Murphy; interview notes of Claimant taken by Dr. Harold Stokes; Claimant's compensation check dated May 7, 2003; depositions of Attorney Leonard A. Washofsky; Drs. Harold Stokes and Robert Steiner. [1]

Employer called two live witnesses, (Dr. Robert Steiner and terminal manager, Joe Lala), and introduced 16 exhibits which were admitted including a LS-202 (first report of injury) dated March 18, 2002, together with a superintendent's injury report dated January 18, 2002; Claimant's payroll records 52 weeks prior to January 18, 2002; choice of physicians forms signed by Claimant; various LS-206, 207, 208's; discovery requests by Employer with Claimant's responses; photographs of vehicles involved in Claimant's January 18, 2002 injury; medical records from Drs. John Montz, William Woessner, Robert Steiner, Harold Stokes, Stuart Phillips; medical records from Medical Center of Louisiana, depositions of Drs. Stokes and Woessner; and Claimant's W-2's for 2000, 2001 and 2002.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on January 18, 2002.

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits CX-__, p.__; Employer exhibits- EX __, p.__; Administrative Law Judge exhibits- ALJX-__; p.___. CX-3(f) showing alleged comparable D clerks wages in 2001, was excluded because Claimant's attorney failed to timely provide these documents to Employer's Counsel. CX-3(f) was not provided until the morning of the hearing, June 5, 2003. (Tr. 49, 87, 88).

2. The injury occurred during the course and scope of his employment with Employer.

3. The Employer was advised of the injury on January 1, 2002.

4. Employer filed notices of controversion on March 18, 2002 and May 29, 2002.

5. An informal conference was held on July 7, 2002.

6. Employer paid temporary partial disability from January19, 2002 through March 26, 2002 for a total of $1,487.83.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Average week wage (AWW).

2. Claimant's entitlement to either temporary total or temporary partial disability benefits.

3. Claimant's entitlement to medical treatment and expenses.

4. Interest and Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 33 year old male who has worked as a longshore clerk at the Port of New Orleans since 1988. He is and has been a member of ILA, Local 1497 since June, 1997, when his former local, ILA, Local 1655 and ILA Local 1802 merged with ILA, Local 1497. (CX-12, pp.5-7; Tr. 94-95). Claimant holds the position of Second Vice-President of Local 1497 and is classified as a D clerk working under a collective bargaining agreement between Local 1497 and various stevedoring companies including Respondent, collectively known as New Orleans Employers Association. (NOEA) (CX-12, p.14).

Pursuant to the NOEA labor agreement, NOEA employers such as Respondent, employ on a regular basis a roster of clerks classified by seniority as A, B, C, clerks, plus additional non-roster

clerks who are dispatched from Local 1497's hiring hall according to their seniority, (A, B, C, D) and work only by the day. Claimant is a Class D, non-roster clerk. (CX-12-18, 19; Tr. 184-186). All clerks regardless of their seniority perform the same type of work with the most senior working in desk and clerk in charge jobs. Hourly wage rates are determined by nature of the cargo handled with steel, plywood, or loose break bulk cargo paying $15.00 to $16.50 per hour with containers working under a gantry paying $27.00 per hour pursuant to a national labor agreement. (CX-12, pp. 20, 21).

Clerks are assigned to work either on ships or at a dockside terminal, as cargo is either loaded or discharged. At the terminal, clerks direct trucks to certain locations where they supervise and record cargo movement. They are also responsible for supervising and recording loading and discharge of cargo from railcars. Terminal work occurs primarily from 8 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m., with minimal overtime and climbing. Vessel work on the other hand provides considerable overtime requiring hatch clerks to routinely climb in and out of ship holes by means of vertical ladders. (CX-12, pp. 34-38).

In addition to hourly pay for time worked, clerks receive vacation, holiday, and royalty pay if they work the requisite number of hours per fiscal year (October 1-September 30). To qualify for vacation pay, a clerk has to work a minimum number of 500 hours per fiscal year after which he is paid $90.00 per 100 hours up to 3000 hours. To qualify for holiday pay, a clerk must work a minimum of 700 hours per fiscal year and is paid $.60 to $.70 per hour up to 2500 hours. Royalty pay requires 700 hours of work per fiscal year and is determined by taking the amount of royalty money put up by employers at the end of the fiscal year and dividing it by the number of qualified clerks. (CX-12, pp. 38-44).

In 2000, Claimant filed his first claim against Respondent for longshore benefits in Case No. 2001-LHC-2229; OWCP No. 07-158071. This claim involved a September 26, 2000 accident which occurred while Claimant was working as a hatch clerk in a ship hole checking cargo. As Claimant was checking cargo he was struck in the back by a forking lift causing him to spin about, hit a roll of paper, and fell to the ground injuring his left shoulder, hip, and back. On October 3, 2000, Claimant was treated at the Marine Medical Unit, where he was diagnosed with chest wall/shoulder contusion. (CX-2, p.159). Thereafter, Claimant sought, and Employer approved, treatment from orthopedist Dr. Stuart Phillips who first saw Claimant on October 12, 2000. (CX-2, p. 45). Claimant presented with complaints of constant, moderate low back pain, hip pain, and left shoulder pain making it difficult for Claimant to lift his arm overhead. After examining Claimant, Dr. Phillips opined that Claimant was suffering from a chest contusion, lumbar sprain with a crushing injury to pelvis, recommended additional testing and provided conservative treatment. (CX-2, pp. 47-50, 155-158).

Dr. Phillips next saw Claimant on November 14, 2000, during which visit Claimant continued to complain of constant low back and left hip pain, anterior chest pain in the left upper quadrant and left shoulder pain with a pulling sensation in the trapezius and posterior shoulder blade region with more than 90 degrees abduction and forward flexion. Dr. Phillips continued Claimant on medication

while diagnosing costochondritis, chest contusion, lumbar sprain, pelvic pain, and left rotator cuff syndrome. (CX-2, pp. 142-143). A subsequent bone scan of the chest and pelvis of November 29, 2000, was found to be normal. (CX-2, p. 141).

Dr. Phillips continued treatment of Claimant seeing him on January 9, and May 24, 2001. During the January 9, 2001 visit, Claimant showed improvement with decreasing pain complaints with mild lumbosacral tenderness and a 10 to 15 degree loss of lumbar motion. Claimant complained of left shoulder popping and weakness, but the examination was essentially normal as was a previous lumbar spine MRI. Dr. Phillips diagnosed shoulder pain, lumbar sprain, contusion to pelvis and bursitis of the left hip limiting Claimant to light work. (CX-2, p.113). On the May 24, 2001 visit, Claimant complained of back and left shoulder pain. Dr. Phillips diagnosed Tietze disease, pelvic joint pain, lumbar strain and rotator cuff syndrome and restricted Claimant from performing manual work. (CX-2, p.84).

While Claimant was being treated by Dr. Phillips, Respondent had orthopedist, Dr. Robert A. Steiner evaluate Claimant on 6 separate occasions: October 23, November 13, December 4, 18, 2000; January 8, and June 1, 2001. On the first examination, Claimant related events concerning his injury and treatment by Dr. Phillips, complained of constant low back pain, recurrent left hip pain with occasional posterior left shoulder pain and occasional pectoralis pain with occasional numbness in the axilla. After examining Claimant and reviewing x-rays of the spine, pelvis, and left shoulder, Dr. Steiner opined that Claimant had sustained a lumbar strain and left shoulder contusion, recommended continued use of anti-inflammatory medications, and a short course of physical therapy, and restricted Claimant to light work. (CX-2, pp.71-73). On the November 13, 2000, visit Claimant complained of soreness and periodic sharp pain in the anterior ribs and along the left shoulder blade region with range of motion. Claimant stated that he had difficulty lifting objects with the left shoulder with back stiffness. Dr. Steiner recommended a limited bone scan of the chest to determine if there had been rib damage, as well as an MRI of the left shoulder, and found Claimant able to do light work avoiding any heavy lifting and overhead activity with the left upper extremity. (CX-2, pp. 68, 69).

On the third examination of December 4, 2000, Claimant continued to complain of recurrent pain in the upper anterior chest region when he moves his left shoulder and arm along with recurrent low back pain and left anterior groin discomfort. By this time, the bone scan had been performed and was found to be normal. Dr. Steiner again said Claimant could do light work, including broom pushing or painting. (CX-2, pp. 62-64).[2] As of the December 18, 2000 evaluation, Claimant was complaining of only low back soreness. Dr. Steiner found Claimant able to do light work. (CX-2, pp.61, 120). Claimant continued to complain of low back soreness on his January 8, 2001 evaluation. The examination on that date showed no tenderness or back spasm with a previous, normal spinal MRI of December 18, 2000. As of January 8, 2001, Dr. Steiner found no objective physical finding

[2] In a November 17, 2000 letter to Respondent, Dr. Steiner stated that Claimant could alternate between standing, sitting, and walking, lifting no more than 10 pounds, and avoiding broom sweeping and painting fork lift machines. (CX-2, p. 67).

on diagnostic study or physical exam showing any permanent injury and stated Claimant was at maximum medical improvement (MMI) and could return to his previous longshore work. (CX-2, pp. 58-61, 128, 129).

On the sixth examination of June 1, 2001, Claimant complained primarily of recurrent discomfort and restricted motion of the left shoulder, as well as, some soreness in the low back. The physical exam showed slight restricted left shoulder motion with minimal tenderness over the anterior shoulder joint. There was no evidence of lumbosacral tenderness or spasm. Dr. Steiner ordered a left shoulder MRI which was performed on June 4, 2001, and showed evidence of a small paralabral cyst with a tear of the anterior superior glenoid labrum, with a focal abnormal signal within the cuff distally suggesting inflammatory change and possible tear. (CX-2, pp. 81, 82). On June 8, 2001, Dr. Steiner by letter to Respondent's Claims Adjuster, Chris Kelly, stated that he had reviewed the June 4, 2001 left shoulder MRI, found objective evidence to support Claimant's shoulder complaints, and suggested possible surgery if Claimant's symptoms became significant. (EX-9, p. 21).

In order to help resolve the dispute between Dr. Philips and Dr. Steiner concerning Claimant's work capacity, the District Director sent Claimant for an independent medical examination by Dr. John R. Montz which was performed on April12, 2001. At this examination, Claimant complained of low back pain and stiffness which worsens with lengthy walking, left leg numbness with prolonged sitting, left hip discomfort with occasional popping, left shoulder pain particularly after tying to lift objects also with occasional popping. Dr. Montz diagnosed lumbar strain and contusion of left shoulder and chest secondary to a soft tissue injury with Claimant at MMI and no residual permanent impairment, and recommended Claimant's employment as a dray and then hatch clerk. (Ex-7, pp. 3-9).

Based upon an average weekly wage of $1,102,65 with a corresponding compensation rate of $735.10, Respondent paid Claimant temporary total benefits of $6,825.92 between October 3, 2000 and December 6, 2000, plus temporary partial benefits from December 7 to January 7, 2001, of $2,141.40, at the weekly rate of $468.43 for a total of $8,967.32. (EX-4, p. 8). This amount was supplemented by an 8(i) settlement on June 26,2001, which resulted in an additional $40,000.00 to Claimant and $3,000.00 to Claimant's attorney. (CX-2, pp. 26-30). According to the settlement agreement, Respondent was responsible for paying all outstanding medical expenses for treatment authorized by Respondent prior to the date of approval of that agreement. At page 3 of the Agreement, the findings of June 4, 2001 shoulder MRI, were noted with the erroneous conclusion that no physician had related those findings to the incident in question. (CX-2, pp. 26-30). [3]

Claimant was off work from September 26, 2001 through November 18, 2001. After returning to work, Claimant on January 18, 2002 suffered a second injury, when the van he was

[3] Before entering into the 8(i) settlement neither Claimant nor his attorney, saw Dr. Steiner's June 8, 2001 letter. (Tr. 104; CX-10, pp. 9-12). Claimant attempted to return to work on September 4, 2001, but Employer declined to hire him believing that he had to undergo surgery before being able to resume longshore work. (Tr. 335-337; 344-345).

driving pinned his left forearm against a trailer. (EX-5, p.17). Claimant was initially treated at a Marine Medical Unit for a lacerated forearm and prescribed medication. (EX-12, pp.12-17)[4]. An ambulance took Claimant to the Medical Center of Louisiana (Charity Hospital), where he was treated for a large laceration of the left forearm and discharged with prescriptions for Reflex, Motrin and Vicodin. (CX-5, pp. 1-6).

Following his treatment at Charity Hospital and the Marine Medical Unit, Respondent referred Claimant to family practice physician, Dr. William J. Woessner who saw Claimant on January 18, 25, 29, February 5, and 19, 2002. On the first visit of January 18, 2002, Dr. Woessner prescribed physical therapy three times a week for two weeks, plus range of motion and strength exercises for the left hand and forearm. On the January 25, 2002 visit, Dr. Woessner removed all but 4 stitches, prescribed Vicodin at bedtime and limited Claimant to light duty with limited use of the left arm and no ladder climbing. Dr. Woessner diagnosed crush injury left arm, v-shaped laceration of left forearm, and contusion and strain of the left wrist. On the January 29, 2002 visit, Dr. Woessner removed the remaining stitches and rendered the same diagnosis and work restrictions he imposed on January 25, 2002. As of the last visit of February 5, 2002, the diagnosis remained the same with no sign of infection, but with Claimant complaining of weakness in the left wrist. Dr. Woessner prescribed additional physical therapy and imposed the same work restrictions of light duty with limited use of the left arm and no ladder climbing. (EX-8).

Being dissatisfied with the progress of his treatment, Claimant sought the services of orthopedic hand and arm surgeon, Dr. Harold Stokes, who saw Claimant on three separate occasions: February 18 and March 5, and 26, 2002. On the first visit of February 18, 2002, Claimant explained that on January 18, 2002 he was on the outside of his van when the parking gear failed to engage causing his left arm to be pinned between the van and a trailer at the mid forearm level. In the process of forcibly removing his arm he sustained a laceration to the dorsal aspect of the forearm whereupon he went to Charity Hospital were the laceration was sutured and Claimant prescribed Vicodin and antibiotics. After examining Claimant's left wrist and forearm, Dr. Stokes opined that Claimant suffered from a laceration to the left forearm, recommended therapy to soften and desensitize the scar. On the second visit of March 5, 2002, Claimant complained for the first time about having severe left shoulder pain which he attributed to the January 18, 2002 injury. Dr. Stokes informed Claimant that he did not treat shoulder problems and recommended seeing a general orthopedist. As far as his left arm was concerned all muscle units were functioning but with complaints of discomfort with repetitive activity. On March 19, 2002, Dr. Stokes wrote Respondent informing them about Claimant's complaints of left shoulder pain and claiming that his forearm prevented him from climbing ladders. However, Dr. Stokes discounted such assertions saying the forearm injury was self limiting, and should be completely healed by March 26, 2002. By the third visit of March 26, 2002, Claimant had completed his course of therapy and had reached MMI with no work restrictions. (EX-10).

[4] The Marine Medical Unit had treated Claimant previously for the September 26, 2000 injury as well as for minor problems such a sprained ankle, sunburn and dehydration.

Since Dr. Stokes did not treat shoulder injuries, Claimant sought out the services of general orthopedist, Dr. Charles P. Murphy. Although Respondent refused to authorize such a change, Claimant nonetheless was able to schedule an appointment with Dr. Murphy on April 4, 2002, during which he complained about severe left shoulder blade and left clavicle pain with numbness down his forearm extending into his fingers. Claimant also complained of relatively constant and severe neck pain with stiffness especially with movement of the left shoulder. After an examination Dr. Murphy opined that by history Claimant suffered a left upper extremity on January 18, 2002 with a well healed left forearm laceration and complains of severe left scapular and supraclavicular area pain and numbness extending into the left arm with a history of previous rotator cuff injury to the left shoulder in September, 2000. Based of Claimant's overall condition, Dr. Murphy recommended further diagnostic work up including MRIs of the cervical spine, brachial plexus and left shoulder along with EMG and nerve conduction studies of the left upper extremity. Dr. Murphy prescribed Vioxx and Lortag and told Claimant to avoid stress to the left upper extremity. (CX-6, pp. 63,64).

MRIs' of the cervical spine, left shoulder, and left brachial plexus performed in April, 2002, showed the following: (cervical) neural foraminal narrowing as a consequence of diffuse bulge of the annulus fibrosis with marginal osteophyte formation right C5-6, C6-7, and left C6-7; desiccation within nucleus pulposus and diffuse bulge of annulus fibrosis at C5-6. C6-7; straightening of normal cervical lordosis; (left shoulder) osteophyte formation arising from the acromioclavicular joint and the undersurface at the lateral aspect of the acromion process; mild bony and cartilagineious degenerative changes involving the glenohumeral and acromioclavicular joints; (left brachial plexus) normal evaluation. (CX-6, pp. 67-71).

On April 15, 2002, Dr. Murphy saw Claimant for a second time after reviewing the cercial, left shoulder and left brachial plexus MRIs along with EMG nerve conduction studies. Dr. Murphy opined that Claimant's complaints of left scapular pain was predominantly pain referred from the cervical spine and that the onset of symptoms were consistent with a crush injury to the forearm which caused a traction injury to the left arm at the time of the January 18, 2002 injury, with the cervical degenerative change pre-existing the January 18, 2002 injury. Claimant also demonstrated mild left shoulder impingement as noted on the MRI, but did not manifest the classic symptoms of intrinsic shoulder impingement. Dr. Murphy noted that Claimant got some relief from Vioxx and recommended avoidance of left arm stress, no overhead work, no lifting or pushing or pulling more than 5 pounds with the left arm. Claimant returned for orthopedic follow up on June 3 and 24, 2002 reporting on June 3 slow but gradual improvement with physical therapy which was limited because Claimant was unable to get off work. As of June 24, 2002, Claimant reported a flare up of symptoms since he stopped therapy with neck pain and stiffness in the left trapezius and left clavicular area. Dr. Murphy recommended restart of physical therapy restricting Claimant of lifting no more than 20 pounds with no overhead work and avoidance of stress to the left arm with use of Celebrex anti-inflammatory medication. (CX-6B, p. 2). Dr. Murphy further opined that Claimant's symptoms were most consistent with referred neuralgic type pain, rather than true intrinsic shoulder pain. (CX-6B, p.1).

Claimant returned to Dr. Murphy for further treatment in July 26, August 30, November 11, 2002, and February 25, 2003. On the July 26, 2002 visit, Claimant reported no change in his overall condition with continued neck, left scapular and left clavicular pain, with an inability to attend therapy because of an inability to get off work. As of the August 30, 2002 visit, Claimant had experienced a slight improvement performing home exercises but not attempting physical therapy because of an inability to get off work. As of the November 11, 2002 visit, Claimant was continuing to use Celebrex but still had some left scapula and trapezius pain. Claimant was again unable to attend physical therapy, but continued with home exercises. By his last visit of February 25, 2003, Claimant's condition remained unchanged with continued complaints of neck left trapezius, left scapula, and left arm pain. In a report of May 25, 2003, Dr. Murphy, based on Claimant's history and subsequent work up, opined that Claimant sustained a traction type injury to the left arm which caused the onset of cervical radicular pain into the left trapezius, left scapula, left peri clavicular, and left arm areas and possessed preexisting degenerative changes of the cervical spine. Dr. Murphy recommended physical therapy along with use of anti-inflammatory medications. (CX-6B, pp.3, 4).

B. Claimant's Testimony

Claimant's testimony dealt primarily with his work history, the September 26, 2000, and January 18, 2002 work place accidents. As noted previously, Claimant is a 33 year old male who has spent most of his adult life working as a clerk at the port of New Orleans during which he was a member of ILA Local 1655 until its merger with ILA Local 1497 in June, 1997. Prior to accidents of September 26, 2000, and January 18, 2002, Claimant worked primarily as a hatch clerk working on ships where he checked cargo as it was being either loaded or discharged from the vessel. Claimant also worked as a dray or terminal clerk checking cargo as it was being received or shipped out from an adjacent terminal. Claimant's hourly rate of pay was determined by the cargo being handled receiving as much as $28.00 per hour under a master or national contract as opposed to $15.00 per hour for terminal work under a local labor agreement. (Tr. 94, 97, 98). Except for 2001, Claimant worked enough hours as a longshoreman to qualify for vacation, holiday and royalty pay. (Tr. 95, 96). According to Claimant, who serves as a vice-president of Local 1497, and dispatches clerks to various work sites Respondent employs about 80% of the Local 1497 clerks. (Tr. 112-129).

Claimant testified that on September 26, 2000 while working for Respondent, he hurt his lower back, hip and left shoulder, and subsequently filed a claim for benefits hiring Attorney Leonard Washofsky to represent him. As a result of this claim, Claimant received $8,967.32 in temporary total and temporary partial benefits plus payment of $4,759.29 in medical expenses. Also, pursuant to an 8(i) settlement agreement signed on June 26, 27, 2001, Claimant received an additional $40,000.00 to cover all claims for compensation and future medical expenses associated with the September 26 , 2000 injury with Attorney Washofsky receiving $3,000.00 for legal services (CX-2, pp. 19, 26-30). Prior to settlement Claimant was unaware of a letter from Dr. Steiner to Respondent dated June 8, 2001, wherein, Dr. Steiner discussed the results of a left shoulder MRI of June 4, 2001, confirmed

that Claimant's complaints and physical findings were consistent with findings of the MRI and stated that if Claimant voiced significant complaints, he should consider left shoulder arthroscopy. (EX-9, p. 21; Tr. 99-104).

Claimant testified that he learned of Dr. Steiner's June 8, 2001 letter in late November, 2001, when he confronted terminal manager Joe Lala about not being hired only to learn from Lala that he would not be hired until he had the appropriate surgery.[5] Claimant filed a grievance with Local 1497 and on November 21, 2001, went back to work for Respondent as a hatch clerk and on occasion working at the terminal. (Tr. 105-112). Claimant was able to do this work without any apparent physical problems and did so until his January 18, 2002 accident. (Tr. 132-134).

On January 18, 2002, while working as a clerk during the loading of containers on the MSE boat, Claimant was standing on the dock awaiting the lowering of bottom car pins when the vehicle he had been driving broke loose from the parking gear and pinned his left arm against an adjacent trailer (bomb cart). Claimant tried to yank his arm free but was unable to do so. Then with the assistance of another heavy set longshoreman who got on the passenger side of van, Claimant was able to free his arm after yanking on his arm two more times. Claimant was then taken by ambulance to Charity Hospital where he got a shot of morphine and had his arm stitched up. Upon leaving the hospital he returned to Respondent who sent him to the Marine Medical Unit where he underwent drug screening and a re-wrapping of the arm. (Tr. 134-141).

Claimant then described his treatment by Dr. Stokes and Dr. Murphy, as noted previously, testifying that the shoulder pain from the second accident was in the front and wrapped around the neck as opposed to the first accident which caused on back side shoulder pain. Claimant testified that Dr. Murphy recommended continued therapy, but he was not able to attend because Respondent would not allow him to work on the days he had therapy. (Tr. 153-161). As a result of the second injury, Claimant asserted that he was limited in his ability to climb, and thus, was unable to perform much hatch clerk work on ships working mostly terminal work paying less per hour with minimal overtime. (Tr.162, 163, 181). Claimant testified that the amount of longshore work available after November, 2001, has remained about the same as it was before. (Tr. 182).[6]

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[5] From September 4, 2001 to November 18, 2001, Claimant had unsuccessfully sought re-employment with Respondent. Claimant's attorney testified that he did not receive Dr. Steiner's June 8, 2001 report until December, 2000, when Claimant sent him a copy of the June 8, 2001 report. (CX-10).

[6] The parties stipulated that longshore personnel who qualified for royalty pay in 2001 all received $6,523.00. Further, longshoremen who made $42,000.00 in that year and qualified for vacation and holiday pay were paid an additional $2,720.00. (Tr. 170-173).

On cross, Claimant testified about the A, B, C, D seniority clerk classification and referral system with D clerks such as himself being referred for work only after A, B, and C clerks were referred. Claimant testified that after the first accident he first obtained employment with Sea Land and Ceres doing container and mechanic work at $15.00 per hour as opposed to the higher master contract rate which was available from Respondent for Class D clerks. Claimant attributed his lack of master contract clerk work for Respondent to Stephen Arceneau. (Tr. 184-196). Even after being hired, Claimant asserted that Respondent gave him primarily terminal work paying only $15.00 per hour even though he was able to go back to full duties. (Tr. 209-215, 231-235). However, Claimant admitted that Dr. Murphy on June 3, 2002, restricted him from performing overhead work and avoiding excess stress to left arm which were the same restrictions imposed by Dr. Phillips on August 30, 2001. (CX-6 p. 14; EX-11, p. 12; Tr. 255, 256).

When questioned by Respondent's Counsel about to whom he voiced shoulder or neck complaints following the second accident, Claimant was sure he had reported it to physicians at Charity Hospital, but then, said he did not know because he was on morphine. Claimant was also unsure whether he had reported the neck and shoulder problems to the Marine Medical Unit personnel, but claimed he told Dr. Woessner on at least one of these visits about the shoulder problems and Dr. Montz. (Tr. 242-251). [7]

C. Testimony of Jimmy McCleland President of Local 1497

Besides providing information about Local 1497's contractual and hiring hall procedures as detailed on pages 2 and 3 of this decision, McCleland testified that from January 18, 2001 through January 18, 2002 plenty of work has been available at the waterfront for clerks. (CX-12, p.22). McCleland testified that he learned from Claimant, that Respondent was not calling him for work from September 1, 2001 to November 19, 2001, so he, (McCleland) called Lala and asked why Respondent was refusing to hire Claimant whereupon Lala stated that Steve Arceneaux had informed him that Claimant needed an operation before he could return to work. McCleland replied that was the first he had heard of a need for surgery and asked if there were any complaints about Claimant's work to which Lala responded there were none. McCleland asked Lala to inquire further about the need for surgery and later learned that Respondent began working Claimant as of November 19, 2001. (CX-4; CX-12, pp. 23, 24). After Claimant resumed work, Claimant again complained about receiving only the lower paying jobs. McCleland in turn called Lala again and reported the problem asking him to assign Claimant to the better paying jobs. (CX-12, pp. 27, 28). McCleland's call was apparently successful, because Claimant began receiving the high paying "plum" jobs from Lala and was even assigned by Lala to be job superintendent. (Tr. 217).

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[7] Dr. Montz declined to see Claimant following the second injury because of his involvement as an independent medical examiner following the first accident. There are no records from Dr. Montz to confirm the fact that Claimant reported a shoulder injury following the second accident.

McCleland further testified that he received another complaint from Claimant that Respondent was not allowing him to work on the days he had to go to therapy per Dr. Murphy's instructions. On May 27, 2002, McCleland called Lala who confirmed the fact that Respondent would not hire Claimant on the days he had scheduled physical therapy, because if he hired Claimant at 8 a.m. for a full day job he expected him to be there all day and he would not release him. (CX-12, pp. 28, 29, 47).

D. Testimony of physicians Drs. William Woessner, Harold Stokes, Robert Steiner

Dr. Woessner, a board-certified family practice physician, testified that he saw Claimant on three occasions, (January 25, 29, and February 5, 2002) on a referral from Respondent. On the first visit of January 25, 2002, Dr. Woessner took a brief history of the January 18, 2002, injury, wherein Claimant described having his left forearm caught on metal flange and sustained a large V shape laceration that was sutured a week prior to his current visit. Dr. Woessner removed four sutures to improve circulation and promote wound healing, put the left wrist in a splint, diagnosed crush injury to left arm, v shaped laceration of the left forearm with a contusion and strain of the left wrist and limited Claimant to light duty consisting of no ladder climbing, limited use of left arm while keeping the left arm clean and dry. (EX-15, pp. 9,10).

On the follow up visit of January 29, 2002, Dr. Woessner removed the remaining sutures and instructed Claimant to continue using the splint while keeping Claimant on the same light duty restrictions imposed the previous visit, consisting of limited use of the left arm, no ladder climbing and keeping the left arm dry. As of the second visit, the wound had healed with a full range of motion of both the forearm and wrist and normal x-ray readings. (EX-15, pp.11-13). On the third and final visit, Claimant complained of pain and weakness of the left wrist for which Dr. Woessner prescribed two weeks of physical therapy. (EX-15, pp.14,15). Dr. Woessner considered the laceration to be a minor injury with no long term problems. Claimant never complained about neck or shoulder pain while under Dr. Woessner's care. (EX-15, pp.18, 19). In addition to use of a splint and having therapy, Dr. Woessner prescribed vicodin and acetaminophen and hydrocodone. (EX-15, pp. 22, 23).

Dr. Stokes testified about his treatment of Claimant with visits of February 18, March 5, and 26, 2002. On the February 18, 2002, Claimant described for the first time forcibly removing his arm and sustaining a laceration which Dr. Stokes measured as ten centimeters long. The exam showed a stable left wrist which Claimant alleged was painful with movement. Dr. Stokes recommended therapy to soften the scar while strengthening the arm. As of the February 18, 2002 visit, Claimant was working at limited duty, but was according to Claimant, unable to climb, and thus, unable to go in and out of ship holes. (EX-14, pp. 6, 7).

On the second visit of March 5, 2002, Claimant for the first time complained of severe left shoulder pain and asserted that the January 28, 2002 injury had aggravated his left shoulder. Dr. Stokes told Claimant that he did not treat shoulder problems and recommended seeing a general orthopedist. Dr. Stokes examined Claimant left arm and wrist, found all muscles to be functioning,

but noted, that Claimant was complaining about an inability to climb ladders with weakness in the left forearm and pain with any exceptional activity. (EX-14, pp. 7-9). By the March 26, 2002 visit, Claimant had completed therapy with a good range of motion, no work restrictions, thus achieving maximum benefit from therapy. (EX-14, pp. 12,13, 14). Dr. Stokes while not able to comment on any connection between the January 28, 2002 injury and a shoulder or neck problem, testified that use of Vicodin at Charity Hospital would not eradicate pain so as to prevent Claimant from reporting it. (EX-14, pp.19). Dr. Stokes testified on Claimant's first visit of February 18, 2002, he had informed one of his nurses that he, (Claimant), was complaining of left shoulder soreness. (EX-14, p. 25).

Dr. Steiner testified about his multiple examinations of Claimant concerning the first and second accident of September 26, 2000 and January 18, 2002 which were set forth in EX-9. Those examinations connected with the September 26, 2000 injury took place on October 23, November 13, December 4 and 18, 2000, and January 8, June 1, 2001. During these examinations, Claimant complained repeatedly about low back, left hip, left chest and left shoulder pain which prompted testing including a bone scan of the chest and pelvis with MRIs of the lumbar and left shoulder areas. As a result of these tests, Dr. Steiner placed various restrictions upon Claimant ranging from sedentary to light work to a recommendation on May 10, 2001 allowing Claimant to return to longshore work. (Tr. 264-269).

One of the more important diagnostic tests was an left shoulder MRI of June 1, 2001 which confirmed a tear of the anterior superior glenoid labrum establishing a basis for Claimant's shoulder complaints and justifying surgery if significant symptoms worsened. (Tr. 269, 269). Following the second accident, Dr. Steiner had an opportunity to examine Claimant again on June 19, 2002, during which Claimant complained of neck stiffness and pinching when he turned his head from side to side along with recurrent left shoulder pain in the anterior and posterior scapula regions with numbness in the left forearm distal to the laceration. The anterior or front part of the shoulder was the same region Claimant had complained of pain in 2001. (Tr. 270-272). After reviewing the left shoulder MRIs of 2001 and 2002, Dr. Steiner testified that he found no appreciable difference between the two. The cervical MRI revealed only degenerative changes with no evidence of neurological deficits or nerve root impingement. (Tr. 273). There was moreover no correlation between the MRIs, EMG and Claimant's complaints of left hand sensory numbness. (Tr. 274-275). Dr. Steiner recommended no further treatment for Claimant's condition and found no contraindications to Claimant's continued performance of longshore work. (Tr. 276, 278, 279).

Dr. Steiner further testified that Claimant's neck and shoulder symptoms were not related to the January 18, 2002 forearm injury, because of Claimant's failure to report these symptoms contemporaneously to the treating physicians. (Tr. 279-280). Dr. Steiner disagreed with Dr. Murphy's conclusion that Claimant's shoulder and neck condition were related to the January 18, 2002 injury, and required further treatment except use of anti-inflammantories. (Tr. 282, 283). Further, there was no objective evidence of a traction injury caused by Claimant allegedly jerking his arm loose. (Tr. 284).

On cross, Dr. Steiner confirmed his testimony that Claimant could perform longshore work even considering the June 1, 2001 MRI. (Tr. 290-292). Further, Claimant's current symptoms were related to those of the first, and not second accident. (Tr. 312-314). Indeed, there is no document evidence of any aggravation or injury to the shoulder as a result of the second injury. (Tr. 319).

E. Testimony of Joe Lala

Joe Lala, Respondent's terminal manager since 1999, testified that he hired clerks every morning upon referral by Roy Centani from Local 1497's hiring hall on the basis of their A, B, C, and D seniority classifications, and Respondent's needs as determined by the arrival of trucks and vessels. (Tr. 321-322). Since 1999, tonnage at the port has gone down resulting in less work and overtime for clerks. Lala estimated about a 10 to 15 % loss of work. Lala admitted a reluctance to use Claimant after his first injury for a period of several weeks because of a concern about his ability to work, and then when he returned to work he was treated like all other clerks in his classification. (Tr. 335-337, 344, 345).

On cross, Lala admitted that Claimant did good work, and in fact, he has hired him as a superintendent on occasion. Further, despite the downturn in work, there was still a lot of work for D clerks, and that in fact, work under the master contract had actually increased since 1999. (Tr. 339, 341). Lala also admitted that since his return, Claimant has done a lot of terminal work, but such work, did not involve ladder climbing and was paid either at the master contract wage or the lower break bulk rates depending upon the cargo involved. (Tr. 342, 343).

IV. DISCUSSION

A. Contention of the Parties:

In its brief, Claimant contends that his neck and shoulder symptoms were the result of his January 18, 2002 accident, and as such, he is entitled to medical treatment for such including all treatment and testing provided by Dr. Murphy as well as physical therapy recommended by Dr. Murphy. Further, he is entitled to a 1-2% permanent partial disability as a result of the left arm laceration and temporary total and/or temporary partial disability as a result of his neck and shoulder injuries which were allegedly caused by the January 18, 2002 accident based upon either an average weekly wage of $1,102.65 (Claimant's annual wage for the year prior to his first accident of September 26, 2000 divided by 52) or $ 947.10 (Claimant's earnings from September, 2001 to

January 18, 2002 accident [$5,231.60], divided by 34 days of work [$153.87] times 260 [$40,006.20] plus vacation and holiday pay of $2,720.00 and royalty pay of $6,523.00 [$49,249.20] divided by 52 [$947.10].

Claimant contends that from January 18, 2002 through September 30, 2002, (37 weeks), the end of the contract year, he earned a total of $19,160.37 or an average of $517.85 per week. When that sum is added to $9,243.00 in stipulated vacation, holiday, and royalty pay ($177.75 per week). Claimant's weekly earnings total $695.60 or a loss of $251.50 resulting in a weekly compensation rate of $167.66 ($251.50 times 2/3).

Employer contends on the other hand that Claimant failed to establish a causal connection between the January 18, 2002 accident and the alleged shoulder and neck injury. Rather, Claimant's neck and shoulder symptoms were connected only to the September 26, 2000 injury, which were fully compensated by a June, 2001, 8(i) settlement agreement. Further, Respondent fully compensated Claimant for the only injuries to the left forearm and wrist he suffered as a result of the January 18, 2002 accident which resulted in a full release by Dr. Stokes on March 26, 2002, and thus, Claimant is entitled to no further compensation.

B. Credibility and Section 20 (a) Presumtion

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In the present case, there is no question that Claimant sustained a lacerated left forearm as a direct result of the January 18, 2002 work place accident. The central issue is whether as a result of that accident, Claimant injured or aggravated either his neck his neck or shoulder causing Claimant to become disabled and seek medical treatment by Dr. Murphy. In establishing a causal connection between the alleged neck and shoulder injury and Claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director,*

OWCP, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2002). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[8] 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom.*, *Gardner v. Director*, OWCP, 640 F.2d 1385 (1st Cir. 1981).

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2003). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

[8] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994).

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Orto Contractors, Inc. v. Charpender*, No 2-60447 (5th Cir. May 21, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87, 56 S. Ct. 190, 193, 80 L. Ed. 229 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994).

In the present case, Claimant testified that he jerked his left arm on three occasions and with the assistance of another heavy longshoreman who stood on the passenger side of Claimant's vehicle was able to pry his arm loose. Relying in large part upon Claimant's rendition of events, Dr. Murphy

opined that Claimant had sustained a traction injury to the left arm aggravating underlying cervical degenerative changes and causing shoulder and neck pain. On the surface it would appear that Claimant established a *prima facie* of a January 18, 2002 shoulder and neck injury.

However, Respondent presented credible and persuasive testimony from Dr. Steiner that in fact there was no such injury, but rather, merely a forearm laceration which had completely healed by March 26, 2002 with no residual impairment. Dr. Steiner testified and the record showed no objective evidence of any traction injury. Indeed, shoulder MRIs existing before and after the January 18, 2002 accident were essentially the same. Further, Claimant did not complain about shoulder and neck problems to any physician until weeks after the alleged injury. Claimant made no reports of shoulder or neck problems to Charity Hospital or Marine Medical physicians. Nor did Claimant reported shoulder or neck problems to Dr. Woessner, who treated Claimant on January 25, 29, and February 5, 2002. Indeed, the first time any recorded report of neck or shoulder problems was made was on February 18, 2002, when Claimant mention the problem to one of Dr. Stokes's assistants, but never voiced any such concerns to Dr. Stokes until March 5, 2002, at which time, Dr. Stokes told him he did not treat shoulder problems and referred him instead to a general orthopedist.

After repeated examinations and review of many diagnostic records, Dr. Steiner, credibly testified that Claimant's neck and shoulder problems were related solely to Claimant's September 26, 2000 injury, which were the subject of a June 26, 2001, 8(i) settlement agreement. I agree with Dr. Steiner not only for the reasons he gave, but also from my observation of Claimant's demeanor on the witness stand and Claimant's failure to call the longshoreman who assisted Claimant in freeing his arm to corroborate his version of the accident. Thus, I do not credit Claimant's allegations of neck and shoulder injuries associated with the January 26, 2002 accident, but rather, find any such problems to be associated with the prior September 26, 2000 accident for which Claimant was completely compensated. Accordingly, I find that Claimant failed to establish a *prima face* case of disability for his shoulder and neck problems.

However, even assuming *arguendo* that Claimant established a prima facie case, I find it was fully rebutted by Respondent. Considering the records as a whole, I find that Claimant sustained only a lacerated forearm on the second injury, and that by March 26, 2002, it had completedly healed with no continuing impairment or need for further treatment.

C. Nature and Extent of Disability and Date of Maximum Medial Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2003). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished

from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, it is clear that Claimant sustained a minor laceration to his left forearm which by March 26, 2002 had completely healed without restriction. While Claimant asserts as 1 to 2 percent permanent impairment based upon Dr. Steiner testimony, it is clear from Dr. Steiner's testimony that he deferred to Dr. Stokes on the degree of disability associated with the forearm injury which was no permanent impairment. (Tr. 315-317).

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1) (2002); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1) (2001). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c) (2002); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers

average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i) (2002).

1. Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a) (2001); *See also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (stating that Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a) (2001). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co. v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998).

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c) (2001); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b) (2002). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991).

3. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c) (2002); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297-98 (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-22 (5th Cir. 1991); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c) (2002).

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426 (5th. 2000) (finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

In the present case, I find that neither Section 10 (a) or 10 (b) apply because Claimant did not work a substantial portion of the year prior to his January 18, 2002 injury due to a previous injury of September 26, 2000. Moreover, there is no credible evidence of similarly situated employees as required by Section 10 (b). Thus, I am required to apply Section 10 (c). Utilizing Section 10(c), I am convinced that the period of time which most reasonably represents Claimant's earning capacity is the time period 52 weeks prior to Claimant's first injury inasmuch as that period is the closest in time to Claimant's second injury in which he worked 52 consecutive weeks. Although Lala testified about an estimated 10 to 15 percent decline in business in 2000 and 2001 from 1999, no records were produced to verify this drop in business. Moreover, Lala admitted that master contract work increased significantly during this period thus allowing clerks to receive substantially higher hourly wages. (Tr. 341-347). Respondent's computation based upon a projected daily wage utilizing days

worked between Claimant's return to work following the first injury and the second injury fails to take into account vacation, holiday and royalty pay which Claimant earned in every year prior to the second injury and are appropriate to include in a computation of Claimant's AWW. *Sproull v. Stevedoring Servs. of America,* 28 BRBS 271 (1994), *aff'd in par* 86 F.3d. 895, 899 (9th Cir. 1996) *cert denied* 520 U.S. 1155 (vacation and holiday pay included in wage determination); *See generally Lopez v. Southern Stevedores,* 23 BRBS 295, 300-01 (1990); *McMennamy v. Young & Co.* 21 BRBS 351 (1988)(container royalty payment included in computation of wage determination).

In the 52 week period prior to Claimant's first injury, Claimant made a total of $57,337.86, which included royalty, vacation and holiday which are properly included in a average weekly wage (AWW) determination. (CX-3A). This results in an AWW of $1,102.65. During the 9.6 week period from January 18, 2002 to March 26, 2002, Claimant earned a total of $4,658.25 or an AWW of $485.23 resulting in a weekly compensation rate of $411.61 ($1,102.65-$485.23= $617.42 x 2/3) for a total compensation of $2,463.63 ($3,95146-$1,487.83 already paid by Respondent to Claimant).

E. Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975) (stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). In this case the only unpaid medical involved with Claimant's left forearm laceration was a $500.00 ambulance fee for Claimant's transportation to Charity Hospital. This is clearly a reasonable and necessary medical expense for which Respondent is liable.

F. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(b) of the Act for the period from January 18, 2002 to March 26, 2002 (9.6 weeks) based on a average weekly wage of $617.42 ($1,102.65- $485.23) x 2/3 for a weekly compensation rate of $411.61 and a total of $2,463.63 ($3,951.46- $1,487.83 already paid by Respondent to Claimant.)

2. Employer shall pay Claimant for all reasonable medical care and treatment arising out of his work-related injury to his left forearm including a $500.00 ambulance fee for Claimant's transportation to Charity Hospital on January 18, 2002, pursuant to Section 7(a) of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE